A

Stone World Sdn Bhd v Engareh (M) Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-55–06 OF 2019(W)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN AND ABDUL RAHMAN SEBLI FCJJ
C 10 AUGUST 2020

Civil Procedure — Judgments and orders — Consequential orders — Impeachment of — Whether consequential order required to give effect to original judgment — Whether High Court was in fact functus officio and thus D *disentitled to grant consequential order — Whether original judgment and findings varied or altered*

The respondent, Engareh (M) Sdn Bhd ('Engareh') filed a suit founded on the E tort of detinue against the appellant, Stone World Sdn Bhd ('Stone World' in Suit No 85. After a full trial Engareh succeeded in establishing its case in detinue. The trial court ordered that the subject matter of the claim, marble stones, be delivered up or that Engareh collected the same. Stone World then sought an amendment or consequential order whereby the option to deliver or F collect was altered such that Stone World was bound to deliver up the marble stones to a specific site within an allocated time. However Stone World did not comply with this order. Engareh, some four years later, sought a consequential order from the trial court for damages to be assessed rather than for the delivery up of the marble stones, as the marble stones had been effectively G ravaged/damaged by time and environment. Stone World objected to the merits of the application but at no time challenged the jurisdiction of the court to grant the consequential order. The trial court granted the consequential order in order to give effect to its judgment that would otherwise be rendered nugatory. Stone World appealed to the Court of Appeal, which upheld the H High Court order. Stone World then initiated a fresh suit in the High Court seeking to impeach the consequential order on the grounds that the High Court had no jurisdiction to grant such an order as it was at the time, functus officio. This claim was dismissed both at the High Court and the Court of Appeal. Hence, this appeal.

I **Held**, dismissing the appeal with costs of RM40,000:

(1) Liberty to apply for consequential orders in order to work out or give effect to the final judgment or order of the court was well within the inherent jurisdiction of the court. The rule of functus officio was not

transgressed. Both the High Court and the Court of Appeal concluded on well-articulated grounds that the consequential order was required to give effect to the original judgment against Stone World for liability in detinue. There was no reason to disagree with the courts below. The consequential order that was made by the High Court subsequently was at all times 'consequential' upon the findings of the trial judge (see paras 36 & 43).

(2) The doctrine of functus officio had not been flouted in relation to the consequential order. The conduct of Stone World necessitated the making of the consequential order. The effect of the consequential order was to substitute the delivery up with damages to be assessed equivalent to the value of the marble stone. The substitution in itself could not amount to a variation calculated to infringe the functus officio rule. The original judgment and the findings were in no way impaired, reopened, varied or altered by the grant of the consequential order. The finding of liability for detinue against Stone World was intact, meaning that the essence of the finding and judgment of the trial court remained intact. Therefore, the argument that the reliefs were mutually exclusive and the consequential order was a variation of the original judgment and order was without merit. The High Court was fully entitled to make the consequential order as the doctrine of functus officio did not take away the inherent power of court to make consequential orders. A change and or replacement of one form of remedy with another form of remedy via a subsequent application resulting in the consequential order did not amount to a variation. The consequential order was not made in 'want of jurisdiction.' The consequential order did not transgress the functus officio rule. On the contrary, the court retained jurisdiction, particularly under the 'liberty to apply' exception to grant such an order which was calculated to ensure that the final judgement or order was not rendered useless (see paras 45–46, 63–66 & 71–72).

(3) The nature of the relief sought in the impeachment suit by Stone World was to impeach solely the consequential order while presumably keeping the rest of Suit No 85 intact or restoring it to its original form. The effect of any impeachment suit premised on a lack of jurisdiction or s 44 of the Evidence Act 1950, if successful, would be to set aside the entirety of the judgment in that suit. This was a fundamental flaw that in itself, precluded Stone World from successfully prosecuting such a suit (see paras 75–76).

(4) The mere assertion of an alleged lack of jurisdiction without more could not, and did not generally, form the basis for the 'impeachment' of a consequential order that was binding between the parties. Furthermore, the issues raised here relating to the doctrine of functus officio, even if established did not mean that the court lacked jurisdiction. Therefore, in

answer to the question whether the inherent jurisdiction of the court ought to be invoked in the present appeal, the answer must be a resounding no. The impeachment suit did not warrant the invoking of the inherent jurisdiction of the court. There had been no want or absence of jurisdiction established so there was no basis for the bringing of the impeachment suit (see paras 79, 82–83 & 86–87).

(5) The fresh 'impeachment suit' on which this appeal was premised, was brought several years after the event, and after all avenues of appeal in Suit No 85 had been exhausted. There could be no clearer example of res judicata and issue estoppel being attracted in relation to the re-agitation of the consequential order. After its grant, Stone World had appealed against the order to the Court of Appeal which dismissed the same. There was no further application for leave to the Federal Court. The consequential order therefore became final and binding between Stone World and Engareh at that juncture (see paras 90–92).

[Bahasa Malaysia summary

Responden, Engareh (M) Sdn Bhd ('Engareh') memfailkan saman yang diasaskan atas tort detinu terhadap perayu, Stone World Sdn Bhd ('Stone World') dalam Saman No 85. Selepas perbicaraan penuh Engareh berjaya membuktikan kesnya atas detinu. Mahkamah bicara memerintahkan agar perkara subjek tuntutan, batu marmar, diserahkan atau Engareh mengambilnya. Stone World kemudian memohon pindaan atau perintah berbangkit di mana pilihan untuk menghantar atau mengambil diubah supaya Stone World perlu menghantar batu marmar ke tapak tertentu dalam masa yang diperuntukkan. Namun, Stone World tidak mematuhi perintah ini. Engareh, kira-kira empat tahun kemudian, memohon perintah berbangkit daripada mahkamah bicara agar ganti rugi dinilai dan bukan untuk pengiriman batu marmar, kerana batu marmar tersebut telah rosak kerana masa dan persekitaran. Stone World membantah permohonan itu tetapi tidak pernah mencabar bidang kuasa mahkamah untuk memberikan perintah tersebut. Mahkamah bicara memberikan perintah berbangkit untuk memberi kesan pada penghakiman yang sebaliknya akan dianggap sia-sia. Stone World merayu ke Mahkamah Rayuan, yang menegakkan perintah Mahkamah Tinggi. Stone World kemudian memulakan saman baru di Mahkamah Tinggi memohon untuk mencabar perintah berbangkit atas alasan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk memberikan perintah kerana pada masa itu, Mahkamah Tinggi functus officio. Tuntutan ini ditolak di Mahkamah Tinggi dan Mahkamah Rayuan. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos RM40,000:

(1) Kebebasan untuk memohon perintah berbangkit untuk menyelesaikan atau memberi kesan pada penghakiman akhir atau perintah mahkamah adalah dalam bidang kuasa sedia ada mahkamah. Peraturan functus

officio tidak dilanggar. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan menyimpulkan dengan alasan yang dijelaskan dengan baik bahawa perintah berbangkit diperlukan untuk memberi kesan kepada penghakiman asal terhadap Stone World atas liabiliti dalam detinu. Tidak ada alasan untuk tidak bersetuju dengan mahkamah bawahan. Perintah berbangkit yang dibuat oleh Mahkamah Tinggi kemudiannya adalah pada setiap masa 'berbangkit' hasil penemuan hakim bicara (lihat perenggan 36 & 43).

(2) Doktrin functus officio tidak dilanggar dalam kaitannya dengan perintah berbangkit. Kelakuan Stone World memerlukan pembuatan perintah berbangkit. Kesan perintah berbangkit adalah untuk menggantikan penghantaran dengan ganti rugi yang akan dinilai setara dengan nilai batu marmar. Penggantian itu sendiri tidak boleh berjumlah kepada variasi yang dikira melanggar peraturan functus officio. Penghakiman asal dan penemuan sama sekali tidak diiganggu, dibuka kembali, berlainan atau diubah dengan pemberian perintah berbangkit. Penemuan liabiliti untuk detinu terhadap Stone World masih sempurna, yang bermaksud bahawa inti penemuan dan penghakiman mahkamah bicara tetap sempurna. Oleh itu, hujahan bahawa relif adalah eksklusif dan perintah berbangkit adalah berlainan dari penghakiman dan perintah asal adalah tanpa merit. Mahkamah Tinggi berhak membuat perintah berbangkit kerana doktrin functus officio tidak mengambil alih hak mahkamah sedia ada untuk membuat perintah berbangkit. Perubahan dan atau penggantian satu bentuk remedi dengan bentuk remedi yang lain melalui permohonan berikutnya yang mengakibatkan perintah berbangkit tidak menimbulkan kelainan. Perintah berbangkit tidak dibuat dalam 'keperluan bidang kuasa.' Perintah berbangkit tidak melanggar peraturan functus officio. Sebaliknya, mahkamah tetap memiliki bidang kuasa, terutama di bawah pengecualian 'kebebasan untuk memohon' untuk memberikan perintah yang dikira untuk memastikan bahawa penghakiman atau perintah akhir tidak dianggap sia-sia (lihat perenggan 45–46, 63–66 & 71–72).

(3) Sifat relif yang dipohon dalam saman pembatalan oleh Stone World adalah hanya untuk mencabar perintah berbangkit sementara menganggap mengekalkan Saman No 85 yang lengkap atau mengembalikannya ke bentuk asalnya. Kesan daripada saman pembatalan yang didasari oleh kurangnya bidang kuasa atau s 44 Akta Keterangan 1950, jika berjaya, akan mengetepikan keseluruhan keputusan dalam saman tersebut. Ini adalah kelemahan utama yang dengan sendirinya menghalang Stone World daripada berjaya menuntut saman tersebut (lihat perenggan 75–76).

(4) Ketegasan semata-mata mengenai dakwaan kurangnya bidang kuasa tanpa lebih tidak dapat, dan secara umum, tidak menjadi dasar untuk

'pembatalan' perintah berbangkit yang mengikat antara pihak-pihak. Selanjutnya, isu-isu yang dibangkitkan di sini berkaitan dengan doktrin functus officio, walaupun dibuktikan tidak bermaksud bahawa mahkamah tidak mempunyai bidang kuasa. Oleh itu, untuk menjawab persoalan sama ada bidang kuasa mahkamah sepatutnya dibangkitkan dalam rayuan ini, jawapannya adalah tidak. Saman pembatalan itu tidak membenarkan pembangkitan bidang kuasa sedia ada mahkamah. Tidak ada kehendak atau ketiadaan bidang kuasa dibuktikan sehingga tidak ada dasar untuk membawa saman pembatalan (lihat perenggan 79, 82–83 & 86–87).

(5) 'Saman pembatalan' yang baru di mana rayuan ini dibuat, dibawa beberapa tahun setelah peristiwa itu, dan setelah semua jalan rayuan dalam Saman No 85 telah habis. Tidak mungkin ada contoh yang lebih jelas mengenai res judicata dan isu estoppel yang tertarik dalam kaitannya dengan membangkitkan kembali perintah berbangkit. Setelah diberikan, Stone World telah merayu terhadap perintah ke Mahkamah Rayuan yang menolaknya. Tidak ada permohonan lebih lanjut untuk kebenaran ke Mahkamah Persekutuan. Oleh itu, perintah berbangkit menjadi muktamad dan mengikat antara Stone World dan Engareh pada masa itu (lihat perenggan 90–92).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

CCI Technology Sdn Bhd & Ors v Pernec Ebiz Sdn Bhd [2016] 2 CLJ 379, CA (refd)

Fritz v Hobson [1880] 14 Ch D 542, ChD (refd)

General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 2 All ER 314, CA (refd)

Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433; [2002] 8 CLJ 503, HC (refd)

Koh Ewe Chee v Koh Hua Leong & Anor [2002] 3 SLR 643, HC (refd)

Law Clerks Association v Honourable Chief Justice LAWS(CAL)-2008-5-90 (unreported), HC (refd)

Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119, FC (refd)

Mahanth Ram Das v Ganga Das AIR 1961 SC 882, SC (refd)

Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor [1982] 2 MLJ 165; [1982] CLJ 257, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)
Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267 (refd)
Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226, FC (refd)
Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2) [2000] 3 SLR 32, HC (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479; [2000] 1 CLJ 553 (refd)
Yap Kian @ Yap Sin Tian v Poh Chin Chuan @ Ors [2016] 7 MLJ 805, HC (refd)

Legislation referred to

Evidence Act 1950 s 44
Rules of Court 2012 O 20 r 11, O 92 r 4

Appeal from: Civil Appeal No W-02(NCvC)(A)-2124–10 of 2018 (Court of Appeal, Putrajaya)

Robert Low (Ahmad Shahrizal Abdul Aziz and Khong Mei Yan with him) (Ranjit Ooi & Robert Low) for the appellant.
Terrence Chan Kah Meng (Chuar Kia Lin with him) (Lim Kian Leong & Co) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] The primary question of law for disposal in this appeal relates to the recurrent problem of identifying when a court is rendered functus officio, as opposed to when it retains jurisdiction and/or remains empowered to grant consequential orders, subsequent to the grant of a final judgment or order.

[2] However, overlying the issue stated above in this appeal, is that of res judicata and issue estoppel, as the present appeal stems from an impeachment suit seeking to set aside orders granted in an earlier suit. This impeachment suit was filed after the grant of final orders in the earlier suit. All avenues of appeal in respect of the earlier suit had also been exhausted.

[3] The background facts are of significance.

A THE BROAD BACKGROUND

[4] The respondent, Engareh (M) Sdn Bhd ('Engareh') filed a suit founded on the tort of detinue against the appellant, Stone World Sdn Bhd ('Stone World') in S-22NCVC-85 of 2010 ('Suit No 85').

B

[5] After a full trial Engareh succeeded in establishing its case in detinue. The trial court ordered that the subject matter of the claim, marble stones, be delivered up or that Engareh collect the same. Additionally the trial court ordered that damages were to be assessed in favour of Engareh and Stone World in respect of its counterclaim.

C

[6] Stone World then sought an amendment or consequential order whereby the option to deliver or collect was altered such that Stone World was bound to deliver up the marble stones to a specific site within an allocated time. However Stone World did not comply with this order.

D

[7] Engareh, some four years later, sought a consequential order from the trial court for damages to be assessed rather than for the delivery up of the marble stones, as the marble stones had been effectively ravaged/damaged by time and the environment.

E

[8] Stone World objected to the merits of the application but at no time challenged the jurisdiction of the court to grant the consequential order. The trial court granted the consequential order on 16 October 2015 ('the consequential order') in order to give effect to its judgment that would otherwise be rendered nugatory.

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[9] Stone World appealed to the Court of Appeal, which upheld the High Court order. No further appeal was filed to the Federal Court.

G

[10] In the meantime damages were assessed in favour of Engareh by the registrar of the High Court and upheld by the judge. Engareh then took out a winding up petition against Stone World. A consent order was entered between Engareh and Stone World in relation to the winding up suit that was then discontinued.

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(The award of damages is the subject matter of a pending appeal in the Court of Appeal).

I

[11] Against this backdrop Stone World then initiated a fresh suit in the High Court seeking to impeach the consequential order on the grounds that the High Court had no jurisdiction to grant such an order as it was at the time,

functus officio. This claim was dismissed both at the High Court and the Court of Appeal, hence the present appeal.

[12] The question before us is whether the High Court, the original trial court was in fact functus officio and thus disentitled to grant the consequential order, or whether the doctrine of functus officio simply did not come into play, as the order was necessary to give effect to the final judgment, and did not in any manner alter or affect the substance of the dispute adjudicated upon by the trial court.

THE LAW RELATING TO THE DOCTRINE OF FUNCTUS OFFICIO

[13] It is settled law that once a court has pronounced a final order it does not possess the authority to re-open, alter, amend and supplement the final order and judgment relating to the dispute it has adjudicated upon. This rule, known as the doctrin e of functus officio, stems from the principle of finality in litigation. There would be great uncertainty and chaos if courts were permitted to review and reconsider final orders and judgments.

[14] This doctrine has been described as '… one of the mechanisms by means of which the law gives expression to the principle of finality' (see *The Origins of the Functus Officio Doctrine, with Specific Reference to its application in Administrative Law* 122 S African LJ 832 (2005) by Daniel Malan Pretorius).

[15] The general rule is that an adjudicator only exercises his decision-making powers once, in respect of a particular matter, so as to give a final and conclusive order or judgment in respect of the particular legal rights or claims made. This decision cannot be revoked or varied by the decision maker. It is important to emphasise in this conte xt that the court is not so much bereft of jurisdiction but is bound by the said rule not to exercise such power in the interests of the finality of litigation.

[16] In *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 553, Gopal Sri Ram JCA (as he the n was) affirmed the position in law that the rule of functus officio is a part of the broader doctrine of res judicata. This body of law in turn comprises the basis for the principle of finality, which is an essential aspect of adjudication, and contributes to the rule of law. As with all general rules there are exceptions to the functus officio doctrine.

[17] There are limited and discrete situations where the court may make a further order subsequent to its previous sealed order. These situations include:

A (a) an amendment of a previous order to reflect the original intention of the court which is evident from the previous and original order, or the body of the judgment of the original order;

(b) under the slip rule O 20 r 11 of the Rules of Court 2012 ('the Rules') to
B correct a clerical error or a similar form of slip;

(c) the clarification, supplementing of or amendment of a previous order so as to give effect to the original order under the 'liberty to apply' provisions; and

C (d) if there is provision in the Rules to amend an original order so as to enlarge time specified.

[18] These are well-recognised and accepted categories where the principle of finality as reflected in the rule of functus officio is not violated.

D

[19] Where is this jurisdiction to amend or supplement the original sealed order found? It is found in the inherent jurisdiction of the courts. The superior courts possess a residual inherent jurisdiction to, inter alia, clarify the terms of an order and to make ancillary orders primarily to give effect to the decision or
E judgment handed down. It is a necessary jurisdiction to enable a court to ensure that substantive justice between the parties is served, so as to give effect to its primary decision, through the dispensing of procedural justice.

F **[20]** That the court has the jurisdiction to dispense ancillary or supplemental orders to augment or substitute the original relief or remedy so as to give effect to the intent and purpose of its original decision is not in doubt. The doctrine of functus officio does not encroach upon that jurisdiction.

G LIBERTY TO APPLY

[21] And the form in which the exercise of such inherent jurisdiction is effected is via the 'liberty to apply' rule. The general principle is that all court orders carry with them the inherent liberty to apply, although this right is often
H expressly reserved in relation to final orders. The existence of such an inherent right has been expressly recognised in two Malaysian cases.

[22] In *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226 a decision of the Federal Court, the practical application of the
I liberty to apply rule is clearly demonstrated. The facts, in summary, are that judgment had been given in favour of the defendant, the appellant in the case, to the effect that the defendant had not been guilty of a breach of a mining sublease.

[23] Counsel for the appellant then applied for an order that the cancellation of its sublease be deleted and that the sublease be restored to the register of the land office. However the court made no decision on that application but advised the appellant to make a formal application.

[24] Before the appeal could be heard by the Federal Court, the respondents subleased the land to another party for three years and this was endorsed on the register of title by the land office. The appellant then made a formal application for an order that the Collector of Land Revenue should delete the cancellation of the sublease.

[25] The respondents opposed the application. In the judgment of Suffian LJ (as he then was) it was held as follows:

> ... It is true that the order of the Federal Court has been perfected and that nowhere in it is mentioned liberty to apply, but in view of what happened immediately after delivery of our judgment it was the clear intention of this court to allow the defendant to make this application. In any event in every order of the court liberty to apply to the court is implied, without its being expressly reserved, *Fritz v Hobson* (1880) 14 Ch D 542.

[26] The case is authority for the proposition that even where an order of the court has been perfected and does not contain any mention of liberty to apply, it is open to the party to make an application so as to give effect to the intention of the final order.

[27] The case of *Kanawagi s/o Seperumaniam v Penang Port Commission* [2001] 5 MLJ 433; [2002] 8 CLJ 503 (which was not cited by either party) is equally illustrative of the application of the rule. It is a decision of the High Court and, with respect, traces the origin of the rule comprehensively. The facts in summary are that the defendant, a public authority, employed the plaintiff first as a clerk and later as its traffic supervisor. In 1981 the defendant embargoed the plaintiff from work when the plaintiff was charged in court for a certain offence.

[28] Subsequently the plain tiff was acquitted and discharged of the charges. The plaintiff sought reinstatement to his position as traffic supervisor. In response, the defendant offered the plaintiff 'reinstatement' to the position of a clerk. The plaintiff rejected the offer, as a consequence of which the defendant dismissed him from employment.

[29] The plaintiff sued the defendant for unlawful dismissal and subsequently obtained summary judgment. The judge granted declaratory orders, inter alia, that the plaintiff's termination was null and void and that damages be assessed by the deputy registrar. The defendant refused to comply

A with these orders and failed to reinstate the plaintiff to his original position. However the defendant did not appeal against these orders.

[30] The assessment of damages proceeded and granted in favour of the plaintiff. It became the subject matter of an appeal which failed. A slew of
B litigation ensued.

[31] Of significance to the present appeal is that the plaintiff took out an originating summons a pplying for consequential orders that he be reinstated to his last held position and be paid the arrears of salaries and emoluments
C owed to him. The defendant resisted the application on the grounds, inter alia, that:

(a) the plaintiff was attempting to reopen the original case and thereby flouting the functus officio rule; and

D

(b) the plaintiff was approbating and reprobating when he elected to claim damages but sought reinstatement at the same time.

[32] The case bears an uncanny similarity to the present case in terms of the
E voluminous and repetitive litigation undertaken over the years, over the simple matter of the delivery up of marble stones and the assessment of damages for detinue. What commenced as a simple matter has now metamorphosed into a morass of confusion and seemingly complex legal issues.

F **[33]** In discussing the doctrine of functus officio, the High Court found that the application for reinstatement made pursuant to the grant of the earlier final declaratory orders, was not an application to re-open the original case so as to vary, alter or amend that final judgment and order. It was held that the application was necessitated by the public authority's deliberate refusal and
G disobedience to comply with the original declaratory orders. As such the plaintiff had no option but to seek consequential orders so as to give effect to the original judgment and declaratory orders handed down by the High Court.

[34] The court went on to examine the principle of finality and concluded
H that the application did not attract 'the rule of res judicata and corollary to it the rule of issue estoppel and functus officio'. Importantly the court pointed out that the application for consequential orders was neither a rehearing nor a re-opening of the case. The judge cited *Fritz v Hobson* [1880] 14 Ch D 542 at p 561, which sets out the fundamental principle expounded by Fry J at p 561
I on liberty to apply in relation to orders of court. It bears repeating here:

> In the next place, it is said that I have no jurisdiction to amend the judgment or to grant this application, because the Court has no jurisdiction to rehear an action. In my opinion I have jurisdiction to grant this application. In thefirst place, it is to be borne in mind that an order was made, although it was not drawn up, directing the

motion in question to stand until the trial. According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said) all orders of the Court carry with them *in gremio* (*in gremio legis* is a Latin term which means 'in the bosom of the law') liberty to apply to the court.

[35] The rationale above was relied upon by this court in *Sungai Biak Tin Mining* per Suffian LJ. Additionally the above ratio has been consistently followed by our courts (see *Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at p 270; *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226 at p 227, *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119 at p 120).

[36] From our case-law it is evident that liberty to apply for consequential orders in order to work out or give effect to the final judgment or order of the court is well within the inherent jurisdiction of the court. To this extent the rule of functus officio is not transgressed. And in the instant appeal both the High Court and the Court of Appeal concluded on well-articulated grounds that the consequential order was required to give effect to the original judgment against Stone World for liability in detinue. There would be no reason to disagree with the courts below, with great respect.

[37] Support for our exposition of the law is also to be found in Singaporean case-law. In *Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2)* [2000] 3 SLR 32 ('Tan Yeow Khoon') the court ordered the examination of accounts of several parties owned by the parties. An expert was appointed but the parties could not agree on the incorporation of certain terms. The plaintiffs applied under the 'liberty to apply provision' (contained in the order of court) to resolve the issue.

[38] The High Court in Singapore held, inter alia, that where the incorporation of terms were for the purposes of sustaining or working out the earlier order made and is nothing more than a complementary or enabling direction to work out the judgment of the court such an incorporation would be allowed under the rule. More significantly the court went on to hold that even if the further direction was to be regarded as a variation, it would be allowed if it was intended to provide 'succor' to the original order. In that case the court had occasion to comment on the unreasonableness and obduracy of the plaintiffs there.

[39] It is difficult to resist a similar comment in the present proceedings where Stone World, not having complied with the final judgment or order of court now seeks to avoid its obligations under an order of court by baldly alleging a lack of jurisdiction in a second set of proceedings brought for the purpose. It appe ars to be the case that while Stone World relies on the doctrine

of functus officio to try and bolster its case, it ignores with impunity the far greater hurdles of res judicata and issue estoppel in its way. But more of that later on in the judgment.

[40] What can be taken away from *Tan Yeow Khoon* is the legal position that even if a consequential order or direction was to be regarded as a 'variation' it would still fall within the liberty to apply rule and not flout the functus officio rule, where it is given to provide 'succour' to the original order. Therefore parties who seek to avoid, undermine or evade an order or judgment of court cannot complain when the opposing party makes an application under the liberty to apply provision so as to give effect to the original order.

[41] The fact that contempt and other remedies are equally available does not necessarily detract or preclude such an application. However each case will turn on its own peculiar facts.

[42] In another Singapore decision, *Koh Ewe Chee v Koh Hua Leong & Anor* [2002] 3 SLR 643, Choo Han Teck JC (now judge) in discussing the nature of the 'liberty to apply' rule stated that in his view the rule is a judicial device not dissimilar to its 'procedural cousin' the 'slip rule' and is intended to supplement the main orders in form and convenience only so that the main orders may be carried out. To this end errors and omissions that do not affect the substance of the main orders may be corrected or augmented but this should not vary or change the nature or substance of the main orders. As to what amounts to a variation will depend on the facts of each particular case. In that case, he dismissed the application made under the rule stating that it was not the right avenue on which to proceed because the orders sought were substantive.

[43] In the instant case the position is that the consequential order that was made by the High Court subsequently was at all times 'consequential' upon the findings of the trial judge, much in the vein of *Kanawagi* and *Sungai Biak Tin Mining*.

[44] It now falls to be considered whether there was in fact an infringement of the functus officio rule or whether the consequential order was made under the inherent jurisdiction of the court as reflected in the liberty to apply rule.

WAS THERE AN INFRINGEMENT OF THE FUNCTUS OFFICIO RULE IN THE INSTANT APPEAL WHEN THE HIGH COURT GRANTED THE CONSEQUENTIAL ORDER, OR DID THE HIGH COURT RETAIN JURISDICTION TO GRANT THE ORDER UNDER THE 'LIBERTY TO APPLY' RULE OR IN ITS INHERENT JURISDICTION?

[45] As has been, with respect, astutely and comprehensively covered in the decision of the Court of Appeal, it is apparent on the facts of this case that the doctrine of functus officio has not been flouted in relation to the consequential order. As is evident from the facts of the case, which have been set out above in paras 4–12, there can be no clearer case of the appellant, Stone World literally 'stonewalling' and refusing to comply with the final judgment and order of the court.

[46] The High Court remarked on the 'continued contumelious refusal' of Stone World to comply with the relief granted, and the Court of Appeal stated that if Stone World's conduct is 'not an abuse of process of court, we do not know what it is'. The conduct of Stone World necessitated the making of the consequential order.

[47] Despite itself seeking clarification from the original final order to enable it to deliver up the marble stones, rather than having Engareh collect the same, Stone World did not comply with the order it had sought. Such was the extent of Stone World's conduct in deliberately failing and/or refusing to comply with the order of court.

[48] The net result is that Engareh was deprived of the fruits of its litigation, requiri ng it to procure a consequential order to give support to the final order so that it would not be rendered nugatory. As outlined above both in *Sungai Biak Tin Mining* and *Kanawagi*, the court recognised that the doctrine of functus officio was not infracted when the order sought were purely to give effect to the original final order.

[49] Stone World maintains that the consequential order amounts to a variation of the original final judgment and order and accordingly, flouts the functus officio rule, warranting the consequential order being set aside (that too, despite this exact contention having been soundly rejected by both the trial court and the Court of Appeal in Suit No 85. This appeal reflects the second attempt by Stone World to put forward this same contention, this time by raising the well-worn plea of a lack of jurisdiction).

[50] What then is the basis for Stone World's contention that this amounts to a variation of the origin al and final judgment and order? To reiterate, the

trial court determined that Engareh had established its case against Stone World in detinue in relation to a quantity of marble stones, which remained in the possession of Stone World.

This is the substantive part of the finding and judgment of the court. Similarly it comprises the substantive part of the final order.

[51] In terms of relief the trial court ordered that:

(a) Stone World deliver up the marble stones as outlined in the claim and appendices within 14 days or alternatively that Engareh or i ts representatives be allowed to enter and take possession of the marble at Stone World's premises in Johor;

(b) damages to be assessed for the loss of use of the marble for specified dates against Stone World; and

(c) damages for wrongful detention of the marble against Stone World.

[52] Stone World's counterclaim was also allowed with damages to be assessed.

[53] The effect of the consequential order was to replace prayer (a) for delivery up with damages instead. In these circumstances can it be said that the original findings, judgment and order for detinue had been altered or varied?

[54] Stone World seeks to argue that the forms of relief for detinue as outlined in *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165; [1982] CLJ 257 ('PKNS') are mutually exclusive and therefore any amendment of the relief ordered in the final order amounts to a variation or material alteration and not a consequential amendment.

[55] In PKNS this court cited *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314 ('General and Finance') where Diplock LJ dealt with the forms of remedy available in an action in detinue. He specified that judgment and remedies afforded could result in one of three forms:

(a) for the value of the chattel as assessed and damages for its detention;

(b) for return of the chattel or recovery of its value as assessed and damages for its detention; or

(c) for return of the chattel and damages for its detention.

[56] The argument appears to be that PKNS is authority for the proposition

that these three remedies are mutually exclusive and therefore, any substitution of one for another, amounts to a material variation which alters the nature of the final judgment or order and thereby flouts the functus officio rule.

[57] However a reading of the case shows that the gravamen of what this court held was that the High Court had not acted in error when it chose to award damages instead of ordering the return of the machinery, although the prayer sought had been for such return. The thrust of the argument before the court was whether the judge was in fact empowered to order damages in lieu of delivery up when the latter relief had been prayed for in the pleadings.

[58] This court found that given the dilapidated condition of the machinery in question the judge had acted correctly and well within his powers and discretion in awarding damages instead of delivery up.

[59] The rest of the judgment deals with the difference between conversion and detinue, particularly the disparate reliefs available under each respective cause of action. This court also considered the issue of the measure of damages in some depth.

[60] However, nowhere in the case is it said that once relief for detinue is granted, the court cannot grant a consequential order in substitution of the original relief, to give effect to its judgment for liability in detinue. It is of course, obvious that all three reliefs cannot be granted at the same time upon a finding of liability made at the end of trial. This is because that would result in a putative plaintiff being triply compensated.

[61] However, the fact that these reliefs cannot be granted cumulatively after a finding on liability has been made, and are to that extent mutually exclusive, does not mean that the court is precluded from substituting the original relief with one of the other reliefs, particularly if this is to give effect to its final judgment and order for liability in detinue.

[62] Put another way, the case is not authority for the proposition that as these reliefs cannot be afforded together or cumulatively at the end of a trial, it does not follow that one of these reliefs cannot be substituted for one of the other reliefs, where the original relief has become useless and ineffective.

[63] It will be recalled that the effect of the consequential order was to substitute the delivery up portion of prayer (a) with damages to be assessed equivalent to the value of the marble stone. This is a recognised and accepted relief for a finding of detinue. It was not granted cumulatively with prayer (a) but in substitution of the same. The substitution in itself cannot amount to a variation calculated to infringe the functus officio rule.

[64] Added to this is the irrefutable fact that the original judgment and the findings there are in no way impaired, reopened, varied or altered by the grant of the consequential order. The finding of liability for detinue against Stone World is intact, meaning that the essence of the finding and judgment of the trial court remains intact.

[65] Therefore the argument that the reliefs are mutually exclusive and the consequential order is a variation of the original judgment and order is without merit.

[66] The High Court was fully entitled to make the consequential order as the doctrine of functus officio does not take away the inherent power of court to make consequential orders. We are fortified in our conclusion by, inter alia, the cases of *Yap Kian @ Yap Sin Tian v Poh Chin Chuan @ Ors* [2016] 7 MLJ 805 and *CCI Technology Sdn Bhd & Ors v Pernec Ebiz Sdn Bhd* [2016] 2 CLJ 379.

[67] The High Court was entitled to make such further order as was necessary to give effect to its judgment, and exercised its inherent jurisdiction to do so under O 92 r 4. The liberty to apply rule is an exception to the functus officio doctrine allowing the court to give effect to its final judgment or order by making consequential orders.

[68] This is an appropriate juncture at which to consider some of the questions of law in respect of which leave was granted, as follows:

> Question 1.1
>
> 1.1 Whether, in an action for detinue, the form of remedies as adopted by the Federal Court in *Perbandanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165, to wit:
>
> (a) For the value of the chattel as assessed and damages for its detention; or
>
> (b) For the return of the chattel or recovery of its value as assessed and damages for its detention; or
>
> (c) For the return of the chattel and damages for its detention;
>
> are mutually exclusive?

[69] We have already explained the issue of mutual exclusivity at some length above. In view of our conclusions above, the question of law in itself appears to be flawed because the *PKNS* case while endorsing the remedies available in detinue by adopting the statements of Lord Diplock in *General and Finance*, did not state that these remedies are mutually exclusive in relation to the grant of a consequential order calculated to give support or 'succor' to the

original final judgment, so as to ensure that such judgment and order is not rendered nugatory.

[70] What can be said is that when granting a final judgment in detinue the three remedies endorsed in *PKNS* ought not to be granted cumulatively. To that extent only the answer is yes. However there is no such embargo in relation to the grant of the consequential order in the instant case:

> Question 1.2
>
> 1.2 If the answer to Question 1.1 above is in the affirmative, whether a change and/or replacement of one form of remedy which was earlier pronounced after trial with that of another form of remedy via a subsequent application for consequential orders amounts to a variation?

[71] The answer to question 1.2 is that a change and or replacement of one form of remedy with another form of remedy via a subsequent application resulting in the consequential order, on the particular facts of this case, does not amount to a variation. Each case will turn on its own unique facts and should be assessed that way.

> Question 1.2.1
>
> 1.2.1 If the answer to Question 1.2 above is in the affirmative, whether such a consequential order made thereto is in want of jurisdiction?

[72] The answer is that the consequential order was not made in 'want of jurisdiction'. The consequential order does not transgress the functus officio rule. On the contrary, the court retains jurisdiction, particularly under the 'liberty to apply' exception to grant such an order which is calculated to ensure that the final judgment order is not rendered useless.

THE LAW ON THE RULE OF 'FUNCTUS OFFICIO' IN OTHER JURISDICTIONS

[73] Turning to other jurisdictions that share our common law system, provides the same result. In the Indian decision of *Law Clerks Association v Honourable Chief Justice* LAWS(CAL)-2008-5-90 (unreported), a case from the High Court at Calcutta, the court pronounced usefully on this doctrine to state that:

> ... in every judgment there are two parts, one is the substantive portion and another is the procedural portion of the judgment. *The procedural portion of the judgment could be the subject matter of modification or clarification application as the doctrine of functus officio has no applicability thereon but so far as the modification or clarification of the substantive portion of the order, it is hit by the principle of functus officio which means that a court ceases to exercise his jurisdiction once any app eal or application is disposed of.* (Emphasis added.)

[74] In making this pronouncement the court relied on the Indian Supreme Court decision of *Mahanth Ram Das v Ganga Das* AIR 1961 SC 882 where the apex court of India held that the functus officio doctrine has no applicability when the modification of the judgment sought relates to the procedural portion of the judgment.

IMPEACHMENT OF THE CONSEQUENTIAL ORDER

Questions 1.3 & 1.4

1.3 Whether, in impeachment proceedings via a fresh action where want of jurisdiction is contended, it is necessary for the plaintiff in the said impeachment proceedings to show that there has been a breach of a substantive statutory provision and/or prohibition premised upon the principles set out by the Federal Court in *Badiaddin bin Mohd Maidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1?

1.4 Whether section 44 of the Evidence Act 1950 confers upon a party a separate and distinct cause of action, in terms of impeachment proceedings, over and above the principles set out by the Federal Court in in *Badiaddin bin Mohd Maidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393?

[75] A preliminary issue that requires comment is the nature of the relief sought in the impeachment suit by Stone World. It appears that it seeks to impeach solely the consequential order while presumably keeping the rest of Suit No 85 intact or restoring it to its original form. Generally any attempt to impeach a judgment will encompass the entire judgment, as the contention is that the illegality or lack of jurisdiction taints the entire proceedings, resulting in the entirety of the judgment in Suit No 85 being set aside. Here however Stone World appears to have concentrated on a piecemeal part of the suit, namely only the consequential order.

[76] The effect of any impeachment suit premised on a lack of jurisdiction or s 44 of the Evidence Act 1950, if successful, would be to set aside the entirety of the judgment in that suit. This is a fundamental flaw that in itself, precludes Stone World from successfully prosecuting such a suit.

DOES THE BARE ASSERTION OF AN ALLEGED LACK OF JURISDICTION WARRANT INVOKING BADIADDIN'S CASE AND S44 OF THE EVIDENCE ACT 1950 FOR THE IMPEACHMENT OF A JUDGMENT ON THE BASIS OF FRAUD AND COLLUSION?

[77] The very rarely exercised inherent jurisdiction of the court as expounded upon in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('Badiaddin'), and impeachment of a judgment on the grounds of fraud or collusion pursuant to s 44 of the Evidence Act 1950, are only warranted in extreme factual and legal situations. This is

trite, from a perusal on the case law relating to these areas. A

[78] It is important to emphasise that this appeal does not engage the inherent jurisdiction of the court to set aside a judgment on the grounds of illegality, or because it is null and void for the contravention of a statute, or by reason of a breach of the rules of natural justice, as expounded by the landmark cases of *Badiaddin* and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 ('Serac'). B

[79] The mere assertion of an alleged lack of jurisdiction without more cannot, and does not generally, form the basis for the 'impeachment' of a consequential order that is binding between the parties, as is the case here. The plea of a lack of jurisdiction should be premised on substantial grounds, evidential or legal, which would justify the court exercising this rare and exceptional jurisdiction. Case law has supported the exercise of such inherent jurisdiction in the extraordinary occurrences of: C D

(a) illegality;

(b) fraud;

(c) contravention of statute; and E

(d) breach of the rules of natural justice

[80] Can such drastic powers be invoked by reason of a tenuous plea of a lack of jurisdiction in a new suit, after the completion of a full trial as well as after the exhaustion of all avenues of appeal? F

[81] More pertinently, having examined and concluded that the High Court did in fact retain jurisdiction to grant the consequential order both in its inherent jurisdiction and the liberty to apply rule, can or should the court set aside the consequential order? G

[82] Further and more importantly the issues raised here relating to the doctrine of functus officio, even if established (which is not the case) does not mean that the court lacks jurisdiction. It means that the court chooses to no longer exercise its powers, having adjudicated on the substantive matter once, in accordance with the principle of finality. There is a distinction there. However it does not arise for consideration here, as the functus officio rule was not infringed. H I

[83] Therefore in answer to the question whether the inherent jurisdiction of the court ought to be invoked in the present appeal, the answer must be a resounding no.

[84] As Azmi FCJ cautioned in his renowned judgment of *Badiaddin*:

> ... any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. *It should not for instance be ap plied to a defect in a final order which has contravened a procedural requirement of any written law*. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature t hat there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception (per Mohd Azmi FCJ, at p 409).

[85] This passage was re-emphasised by Gopal Sri Ram JCA (as he then was) in *Prorak*.

[86] In these circumstances the impeachment suit does not warrant the invoking of the inherent jurisdiction of the court as envisaged in either *Badiaddin* or statutorily provided for in s 44 of the Evidence Act 1950. Our answers to questions 1.3 and 1.4 are therefore as follows:

> Question 1.3:
>
> Whether, in impeachment proceedings via a fresh action where want of jurisdiction is contended, it is necessary for the plaintiff in the said impeachment proceedings to show that there has been a breach of a substantive statutory provision and/or prohibition premised upon the principles set out by the Federal Court in *Badiaddin bin Mohd Maidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1?

[87] There has been no want or absence of jurisdiction established so there is no basis for the bringing of the impeachment suit. Although the bases for the exercise of inherent jurisdiction as envisaged in *Badiaddin* is not closed, it would require exceptional circumstances to justify the invoking of this jurisdiction to set aside a judgment or final order.

> Question 1.4:
>
> Whether section 44 of the Evidence Act 1950 confers upon a party a separate and distinct cause of action, in terms of impeachment proceedings, over and above the principles set out by the Federal Court in in *Badiaddin bin Mohd Maidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393?

[88] The answer is that s 44 of the Evidence Act 1950 recognises and gives effect to a cause of action founded on fraud, collusion or an absence of jurisdiction, the relief being an impeachment of such judgment. That such a

cause of action subsists and is recognised in law is borne out by the case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1.

RES JUDICATA AND ISSUE ESTOPPEL VIS A VIS STONE WORLD IN THE IMPEACHMENT SUIT

[89] As stated at the outset, the overlying hurdle to Stone World's impeachment suit is the fact that res judicata and issue estoppel are fully applicable to preclude it from prosecuting this suit.

[90] Additionally the fresh 'impeachment suit' on which this appeal is premised, is brought several years after the event, and after all avenues of appeal in Suit No 85 had been exhausted.

[91] There can be no clearer example of res judicata and issue estoppel being attracted in relation to the re-agitation of the consequential order.

[92] It will be recalled that after its grant, Stone World appealed against the order to the Court of Appeal which dismissed the same. There was no further application for leave to the Federal Court. The consequential order therefore became final and binding between Stone World and Engareh at that juncture (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; *Henderson v Henderson* (1843) 3 Hare 100; and *Greenhalgh v Mallard* [1947] 2 All ER 255).

[93] The appellant seeks to answer this insurmountable obstacle by maintaining that res judicata is inapplicable where the court is 'wanting' in jurisdiction. However in view of our conclusion that the court did indeed possess the requisite jurisdiction, the is sue does not arise for consideration. Accordingly with respect to question 5:

> 1.5 Whether the principles of issue estoppel as set out by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 is applicable in impeachment proceedings where want of jurisdiction is contended?

[94] Our answer is that there is no necessity to deal with this question in view of our conclusion that the court retained the requisite jurisdiction to grant the consequential order. The appeal is dismissed with costs of RM40,000 subject to allocatur.

Appeal dismissed with costs of RM40,000.

Reported by Ahmad Ismail Illman Mohd Razali